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**No. 90-7099 EEOC's Opposition to Appellant's Motin to Strike
EEOC's Brief as Amicus Curiae (with letter from EEOC)**

United States Court of Appeals

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U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
General Counsel

August 21, 1990

Ms. Constance DuPre, Clerk
United States Court of Appeals
For the District of Columbia
United States Courthouse
3rd & Constitution Avenue, N.W.
Washington, D.C. 20001

RE: Ann B. Hopkins v. Price Waterhouse, 90-7099.

Dear Ms. DuPre:

Please find enclosed four copies and one original of EEOC's Opposition to Appellant's Motion to Strike EEOC's Brief as Amicus Curiae. If you have any questions or concerns, please do not hesitate to contact me at the address or telephone number noted below.

Sincerely,

A handwritten signature in cursive script, reading "Susan L.P. Starr", is written over a yellowed, irregularly shaped piece of paper or tape that is partially covering the text.

SUSAN L.P. STARR
Appellate Attorney

Equal Employment Opportunity
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cc: counsel of record

ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 7, 1990

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 90-7099

ANN B. HOPKINS,

Plaintiff-Appellee,

v.

PRICE WATERHOUSE,

Defendant-Appellant.

On Appeal from the United States District Court
For the District of Columbia

EEOC'S OPPOSITION TO APPELLANT'S
MOTION TO STRIKE EEOC'S BRIEF AS AMICUS CURIAE

1. Appellant Price Waterhouse initially argues that EEOC's brief should be stricken because the Commission did not participate in this case in earlier proceedings and because it was not aware that the Commission was going to participate until August 9, 1990, one day after it received Hopkins' brief. Price Waterhouse's reasons for striking the Commission's brief are completely without legal foundation. Rule 29 F.R.A.P. states that an agency of the United States has a right to participate as amicus curiae irrespective of the parties' consent or leave of the court. The Commission is under no obligation to notify opposing counsel of its

intent to file a brief as amicus, although we did so in this case out of courtesy to Price Waterhouse. The Commission filed its brief only two days after Hopkins' brief was filed¹ so as to give Price Waterhouse as much time as possible to respond to the Commission's argument in its reply brief.²

2. Price Waterhouse alleges that the Commission's brief should also be stricken because it is rife with inaccurate factual assertions. However, the Commission supported every statement Price Waterhouse now challenges by a cite to a published decision. Price Waterhouse fails to show how the brief misrepresents the particular authority cited, with one possible exception³. Instead, they attempt to hide behind a smokescreen of baseless allegations

¹ Local Rule 11(e)(3) allows amicus briefs to be filed as much as fifteen days after "service of the brief of the party whose side the intervenor or amicus supports." Because this was an expedited appeal, the Commission filed its brief well ahead of that schedule.

² Price Waterhouse chose not to address the Commission's arguments in its August 15, 1990 reply brief, allegedly because they were not notified earlier of the Commission's participation. However, despite its argument that the lack of additional notice "deprived Price Waterhouse of a meaningful opportunity [to respond]" (appellant motion at 2), Price Waterhouse apparently had sufficient time to challenge many of the issues raised in the Commission's brief in its motion to strike, filed the very same day as the reply brief.

³ Price Waterhouse correctly points out that this Court stated in its 1987 decision that there was only one comment made by a partner who opposed Hopkins' candidacy which was gender specific. Motion at 4, n.1. However, it appeared from the district court's findings that there were two gender specific comments made by opponents of Hopkins. ("One commentator said 'she may have overcompensated for being a woman.' Another suggested that she needed to take a 'course in charm school.' Supporters indicated that her critics judged her harshly due to her sex . . . " Hopkins, 618 F. Supp. 1109, 1115-16).

of EEOC misconduct.

Price Waterhouse argues that the Commission's statement that "it was clear from the evidence that [Price Waterhouse] would not voluntarily admit her to the partnership" (EEOC br. at 9) misstated the record. However, the Commission could not have been more accurate. The district court said, "[o]rdering Price Waterhouse to simply reconsider Ms. Hopkins for partnership would be futile and unjust, because the testimony of Price Waterhouse's chairman at the relief trial suggested that the deck is stacked against her. Price Waterhouse plainly does not want her and would not voluntarily admit her." Slip op. at 19.

Citing the district court's vacated 1985 decision, Price Waterhouse also argues that it was inaccurate for the Commission to state that sexual stereotyping permeated their decision to place Hopkins' candidacy on hold. Again Price Waterhouse chooses to ignore the specific findings of fact and conclusions of law in the district court's 1990 decision. The court held that Price Waterhouse failed to meet its burden of specifically identifying which partner comments were tainted by sexual stereotyping and which were not, thereby leaving the court to conclude that sex discrimination motivated the decision to place Hopkins' candidacy on hold:

Price Waterhouse, having permitted discriminatory comments to be weighed in the hold decision when appraising Ms. Hopkins, was required to separate the good from the bad . . . It was apparent from the testimony that disentangling stereotyping from fact is difficult . . . Moreover, the Court has been provided with no guidance to enable it to differentiate between all sexually stereotyped comments and comments not influenced

by stereotyping . . . Ms. Hopkins must be deemed to have failed to receive partnership at the time she was held over because of sex discrimination, in violation of Title VII.

Slip op. at 8-9, 11. In light of these findings, the Commission's characterization of Price Waterhouse's 1982 partnership evaluation process as being permeated by sexual stereotyping was completely accurate.

Price Waterhouse also alleges that the Commission mischaracterized the record by stating that Price Waterhouse failed to introduce evidence that its partners were not motivated by discriminatory animus. However, that is not what the Commission's brief says. The Commission did not offer an opinion as to whether Price Waterhouse did or did not introduce evidence on this issue in the 1985 trial. Instead, the brief merely states that the Commission agrees with the district court's conclusion that, as part of its burden of proof, Price Waterhouse was obligated to present some evidence of the partner's motivations. EEOC br. at 14. The Commission went on to embrace the district court's conclusion that, because Price Waterhouse failed to present any evidence whatsoever on remand, Price Waterhouse failed to meet its burden. See slip op. at 10. Price Waterhouse is apparently challenging the district court's findings of fact and the Commission's reliance thereon. Although they certainly have a right to do so, Price Waterhouse's characterization of EEOC's brief as distorting the record is inaccurate.

WHEREFORE, the EEOC respectfully requests this Court deny
Price Waterhouse's motion to strike EEOC's brief in this appeal.

Respectfully submitted,

DONALD R. LIVINGSTON
General Counsel(Acting)

GWENDOLYN YOUNG REAMS
Associate General Counsel

VINCENT J. BLACKWOOD
Assistant General Counsel

A handwritten signature in cursive script that reads "Susan L.P. Starr". The signature is written in dark ink and is positioned above a horizontal line.

SUSAN L.P. STARR
Attorney

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing motion have been sent by messenger, costs prepaid, to the following counsel of record:

Theodore B. Olson

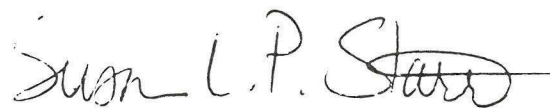
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August 21, 1990